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No. 02-9410

IN THE
Supreme Court of the United States

MICHAEL D. CRAWFORD
Petitioner,

v.

WASHINGTON,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF LAW PROFESSORS SHERMAN J. CLARK, JAMES J. DUANE, RICHARD D. FRIEDMAN, NORMAN GARLAND, GARY M. MAVEAL, BRIDGET MCCORMACK, DAVID A. MORAN, CHRISTOPHER B. MUELLER, AND ROGER C. PARK, IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2(b), Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park respectfully move this Court for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has granted consent, but respondent has refused consent.

This case raises important questions about the meaning of the Confrontation Clause of the Sixth Amendment to the Constitution, which is a central aspect of our criminal justice system. In particular, the second Question Presented in the petition for *certiorari* suggests that the currently prevailing

framework of doctrine under the Clause be reconsidered, to be replaced by one limiting the scope of the Clause to statements that are testimonial in nature but prescribing unequivocally that such statements may not be introduced against an accused unless he has had an opportunity to confront the maker of the statement. *Amici* are law professors who have had considerable experience dealing with the Confrontation Clause, variously writing, teaching, and litigating about it. We believe that a reconceptualization along the lines proposed by petitioner would be a great improvement in the law. Our interest in this case is not to support either prosecution or defense – in some settings the structure we propose would favor one side and in some settings the other – but to assist the placement of the Confrontation Clause on a proper footing, as expressing a rather narrow but hard-edged right.

Sherman J. Clark is Professor of Law at the University of Michigan Law School. He is the author of *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003), which supports and offers an explanation for the "testimonial" approach to the Confrontation Clause.

James J. Duane is Professor at Regent University School of Law. He teaches Evidence and Trial Advocacy, among other courses. He is co-author, with Glen Weissenberger, of FEDERAL EVIDENCE (4th ed. 2001). Among the topics related to confrontation on which he has written are conspirator statements and declarations against interest.

Richard D. Friedman is Ralph W. Aigler Collegiate Professor of Law at the University of Michigan Law School. He has written extensively on the Confrontation Clause, and has advocated the testimonial approach to that Clause in several articles. He is general editor of THE NEW WIGMORE: A TREATISE ON EVIDENCE, and author of THE ELEMENTS OF EVIDENCE (2d ed. 1998).

Norman M. Garland, Professor, Southwestern University School of Law, has been teaching Evidence for 32 years, first at

Northwestern University School of Law and then at Southwestern. He has authored numerous books and articles dealing with evidence, criminal law, and criminal procedure.

Gary M. Maveal is Associate Professor, University of Detroit Mercy School of Law, and has taught Evidence for 14 years. Previously, he was an Assistant United States Attorney for the Eastern District of Michigan.

Bridget M. McCormack is Associate Dean for Clinical Affairs and Clinical Professor of Law at the University of Michigan Law School. She is the co-author with Prof. Friedman of *Dial-In Testimony*, 150 U.PA. L. REV. 1171 (2002), which advocates the testimonial approach.

David A. Moran is Assistant Professor of Law at Wayne State University Law School. Previously, he was an attorney with the Michigan State Appellate Defender's Office. In that capacity, he litigated several cases highlighting the difficulties that state trial courts have in applying the *Roberts* framework . *See, e.g., Bulls v. Jones*, 274 F.3d 329 (6th Cir. 2001) (granting habeas relief where state trial court admitted non-testifying co-defendant's police statement as substantive evidence against defendant). He and Prof. Friedman are working together on a volume, part of THE NEW WIGMORE, dealing with some aspects of the law of hearsay and confrontation.

Christopher B. Mueller is the Henry S. Lindsley Professor of Procedure and Advocacy at the University of Colorado School of Law. For the last 30 years, he has taught and written about evidence law, often with Laird C. Kirkpatrick (now Dean, University of Oregon School of Law). Among the works by Mueller and Kirkpatrick are FEDERAL EVIDENCE (2d ed. 1994) (5 volumes), EVIDENCE (3d ed. 3002), MODERN EVIDENCE (2nd ed. 1999), and EVIDENCE UNDER THE RULES (4th ed. 2000). Professor Mueller has also written specifically about various aspects of hearsay, including difficulties in applying the doctrine to statements by alleged co-offenders. *See Tales Out of School, Spillover Confessions and Against-Interest*

Statements Naming Others, 55 UNIV. MIAMI L. REV. 929 (2001); *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 232 (1984).

Roger C. Park holds the James Edgar Hervey Chair in Litigation at Hastings College of the Law, University of California. He was a member of the faculty of the University of Minnesota Law School for more than twenty years. Many of his law review articles focus on hearsay evidence, some of them from an empirical standpoint. Among his numerous books on evidentiary topics is CASES AND MATERIALS ON EVIDENCE (9th ed. 1999, with Jon R. Waltz).

Because we believe that current doctrine undervalues the significance of the confrontation right in our constitutional scheme, and we believe this case offers an opportunity to redress the situation, we respectfully seek leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE[1]

The interest of *amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae*.

STATEMENT OF THE CASE

We adopt the statement of the case in the petitioner's brief, with these additional comments. Like *Lee v. Illinois*, 476 U.S. 530 (1986), and *Lilly v. Virginia*, 527 U.S. 116 (1999), this case is an example of what might be called station-house testimony. Sylvia Crawford, the petitioner's wife, made a tape-recorded statement to investigating officers at the police station on the night of the alleged crime. Sylvia was unwilling to testify at trial against her husband, and was deemed by all parties to be unavailable as a witness. Over petitioner's objection, Sylvia's statement was introduced, and petitioner was convicted. *Amici* file this brief to address the second Question Presented in the petition for *certiorari*:

> Whether this Court should reevaluate [the] Confrontation Clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements.

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[1] No counsel for any party authored any part of this brief. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to Richard Friedman and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amici curiae*. Except as just noted, no persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

By granting *certiorari* in this case, the Court has created an opportunity to replace an unsatisfactory conception of the Confrontation Clause with one that is historically well grounded, textually faithful, intuitively appealing, and straightforward in application. This conception confines the Clause to its proper sphere and at the same time makes clear the place of the confrontation right as one of the fundamental cornerstones of our system of criminal justice. Adopting this conception will also make the law far easier than current doctrine for the lower courts to follow, because the Confrontation Clause decisions of this Court will be explained by reference to a robust, easily understood principle with deep roots in the Anglo-American tradition and, indeed, throughout Western jurisprudence. This principle is that the testimony of a witness may not be used against an accused unless it was given under the conditions prescribed for testimony, among which are that it be under oath or affirmation, that it be given in the presence of the accused, and that it be subject to cross-examination.

Implementation of the principle requires recognition that a statement may be testimonial in nature even though it was not made under the conditions prescribed for testimony. Thus, a statement made knowingly to authorities accusing another person of a crime is clearly a testimonial statement – even though it was made without oath or cross-examination and in the presence of no one but the authorities. If a report by the authorities of a statement made in this way may be considered by the trier of fact, then a system has been created that tolerates the giving of testimony behind closed doors. The very point of the Confrontation Clause was to prevent the creation of such a system. That a statement was made absent the conditions required by the system for testimony does not render the statement non-testimonial in nature – rather, if the statement

was testimonial in nature, the absence of those conditions renders the testimony intolerable. Put another way, the Confrontation Clause gives the accused more than a right to confront "all those who appear and give evidence at trial." *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring). Its primary impact is to ensure that prosecution witnesses *do* give their evidence at trial, or if necessary at a pretrial proceeding at which the accused is able to confront them.

Like the right to counsel and the right to a jury trial, the right to confront witnesses is subject to waiver, and it is also subject to forfeiture, for the accused has no ground to complain if his own wrongdoing caused his inability to confront the witness. Like those other rights, the right to confront adverse witnesses can and should be applied unequivocally. That is, if the statement is a testimonial one and the right has not been waived or forfeited, then the right should apply without exceptions. This simple approach is possible because the scope of the right, properly conceived, is quite narrow. It does not reach out-of-court statements in general, but only those that are testimonial in nature.

Under the currently prevailing doctrine, by contrast, the scope of the Clause is extremely broad: Any hearsay statement made by an out-of-court declarant is presumptively excluded by the Clause. A flat exclusionary rule of such breadth would be impractical, and so the doctrine exempts from the presumptive rule many statements that are deemed to be reliable – purportedly so reliable that cross-examination would be of little value. Statements that fit within "firmly rooted" hearsay exceptions are deemed reliable without more. Just which of the many hearsay exceptions – a term used in this brief to cover both exceptions proper to the rule against hearsay and exclusions from the definition of hearsay – are considered to be "firmly rooted" is a question that this Court has only partially resolved. On an ad hoc basis, the Court has declared hearsay

exceptions, or parts of them, either within that category or not, but the Court has never offered a clear set of criteria for determining what makes an exception "firmly rooted." If a statement does not fit within a "firmly rooted " exception, it may yet satisfy the reliability requirement, if the statement is deemed to have "individualized guarantees of trustworthi[illegible]." This standard is heavily fact-bound and demands case-by-case review. Even if a statement is deemed reliable, the Confrontation Clause may bar its use if the declarant is available to be a witness. As with reliability, the criteria for the unavailability requirement are unclear. If the statement falls within the exception for former testimony, the declarant must be unavailable or the Clause will preclude its use; if the statement falls within the exceptions for spontaneous declarations, statements made for purposes of medical treatment, and conspirator declarations, unavailability is not required; in other contexts it is not yet known whether the unavailability requirement applies.

This framework is unpredictable and over-complicated, and so it too frequently yields very bad results in the lower courts. The framework is capable of producing good results; indeed, adopting the approach proposed in this brief would not require the Court to overrule any of its Confrontation Clause decisions. But the existing framework reaches good results consistently only if it is manipulated. In this respect, it resembles the Ptolemeian astronomical system. That system, too, was capable of yielding good results, but only if it was manipulated and made ever more complex to ensure that its results matched empirical observations. Ultimately, then, the system failed to explain coherently the phenomenon it was trying to describe. Because the system's predictive power was thus limited, it became necessary to adopt a new organizing principle. In the confrontation context, too, a new organizing principle is necessary: rather than treating the Confrontation Clause as a generalized attempt to exclude unreliable hearsay

evidence, the Court should recognize that the Clause is a guarantee that *testimony* offered against an accused must be given in the manner prescribed for centuries, in the presence of the accused and subject to cross-examination.

ARGUMENT

I. THE TEXT OF THE CONFRONTATION CLAUSE SUPPORTS A TESTIMONIAL APPROACH TO THE CLAUSE, AND NOT THE *ROBERTS* FRAMEWORK.

We begin with the text of the Confrontation Clause. It provides in simple terms:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Now compare how this language squares respectively with the prevailing framework established by *Roberts* and with the testimonial approach proposed here. The prevailing framework was laid out by *Roberts*, 448 U.S. at 66. As subsequently modified, it has these principal elements:

1. *"[W]hen a hearsay declarant is not present for cross-examination at trial," use of the hearsay declaration is presumptively barred by the Confrontation Clause.* The basic definition of hearsay, as expressed in Federal Rule of Evidence 801(c), is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The text of the Confrontation Clause does not refer to hearsay, however, and nothing in it suggests that its scope is as broad as the definition of hearsay. A person who makes a statement in the ordinary course of her affairs, without any reasonable anticipation of

litigation, is a hearsay declarant if the statement is later offered at trial to prove the truth of what it asserts, but it would be an unnatural reading to conclude that this makes her a "witness" within the meaning of the Confrontation Clause.

2. *Even though it is hearsay, an out-of-court statement may be admitted against an accused (subject to the possible applicability of an unavailability requirement) if it is sufficiently reliable. Under this doctrine, statements are deemed reliable if the evidence either "falls within a firmly rooted hearsay exception" or "contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability."* *Lilly*, 527 U.S. at 124-25, *quoting in part Roberts*, 448 U.S. at 66. Nothing in the text of the Confrontation Clause, however, suggests that if a statement falls within the scope of the Clause its use against the accused may yet be allowed because of a judicial determination that the statement is reliable. The Clause says that in *all* criminal prosecutions the accused shall enjoy the right to be confronted with *the* witnesses against him, not simply those whom judges deem sufficiently unreliable to warrant cross-examination. The Clause contains no hint of a reliability test, and no suggestions of exceptions to its categorical bar.[2]

In short, the *Roberts* framework depends on a set of concepts – hearsay, reliability, and exceptions – none of which

[2] As originally articulated by *Roberts*, the framework also generally precluded use of hearsay unless the declarant was unavailable to testify at trial. Subsequent cases have cut back on this requirement. It applies to former testimony, as in *Roberts* itself; it has been held not to apply to statements falling within the exceptions for conspirator statements, *United States v. Inadi*, 475 U.S. 387 (1986), spontaneous declarations, and statements made in the course of receiving medical care, *White v. Illinois*, 502 U.S. 346 (1992). In other contexts its applicability is unclear.

is supported by the text of the Confrontation Clause.

In contrast, that text squares very well with the testimonial approach, the core of which may be expressed as follows:

> Use against an accused of the statement of a witness – that is, a statement that is testimonial in nature – violates a right of the accused unless the accused has or has had an adequate opportunity to confront the witness.[3]

The key aspect of this approach is equating a witness with a person who makes a testimonial statement. But that is a very natural reading. The Latin for witness is *testis*. Adolf Berger, *Encyclopedic Dictionary of Roman Law*, 43, Pt. 2 TRANS. AM. PHIL. SOC. 335, 735 (1953). That word shares a root with *testimonium*, the core meaning of which is "the testimony of a witness." *Id.* And that, of course, is the source of the English word testimony. The derivation appears to be through the Old French, 17 THE OXFORD ENGLISH DICTIONARY 833 (2d ed. 1989); thus, in the modern French witness is *témoin* and testimony is *témoinage*.

Of course, to give this approach life, it is necessary to invest the word *testimonial* with meaning. As discussed in Part IV, there is some ambiguity about the edges of the word's meaning.[4] For now, though, it suffices to say that a statement

[3] A subsidiary principle is that if the accused has had an adequate opportunity to confront the witness at an earlier time but, without fault of the prosecution, the witness is unavailable to testify at trial, then the witness's prior statement may be used. Part IV contrasts this principle and the unsatisfactory method by which the prevailing framework treats unavailability.

[4] The same can be said about the term *confront*. In most cases, the meaning is clear: The witness must testify in the presence of the accused, subject to cross-examination. Questions such as when or

that is made with the reasonable anticipation that it will be used in a criminal prosecution should be considered testimonial, while a statement that is made in the ordinary course of affairs, with no prospect of evidentiary use in the offing, is not testimonial.

The text of the Confrontation Clause is important in this context not only because of its intrinsic authority but also because, as we will now show, it expresses a fundamental principle with deep historical roots: A witness may not testify against an accused unless she confronts him with the testimony.

II. THE HISTORY UNDERLYING THE CONFRONTATION CLAUSE SUPPORTS A TESTIMONIAL APPROACH TO THE CLAUSE, AND NOT THE *ROBERTS* FRAMEWORK.[5]

If an adjudicative system is rational, then it must rely in large part on the testimony of witnesses and prescribe the conditions under which they may testify. For many systems, one such condition is that testimony must be given under oath. Another common condition, characteristic of the common law system but not limited to it, is that testimony of a prosecution witness must be given in the presence of the accused, subject to questioning by him or on his behalf. The ancient Hebrews required confrontation, Deut. 19:15-18, as did the Romans. A

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whether the witness and the accused may be in different rooms but connected by a video transmission, *see, e.g., Maryland v. Craig*, 497 U.S. 836 (1990), or whether the accused's opportunity to cross-examine was adequate, *see, e.g., United States v. Owens*, 484 U.S. 554 (1988), are not presented by the current case.

[5] A more extensive historical discussion, with fuller citations, is in Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U.PA. L. REV. 1171, 1202-09 (2002).

Roman governor, Festus, pronounced: "It is not the manner of the Romans to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Acts, 25:16.

Once the irrational methods of medieval adjudication, such as trial by ordeal and by battle, withered away, Western legal systems developed different approaches to testimony. Continental systems tended to take testimony on written questions – behind closed doors and out of the presence of the parties – for fear that the witnesses would be coached or intimidated. By contrast, beginning in the 15th century and continuing for centuries afterwards, numerous English judges and commentators – John Fortescue, Thomas Smith, Matthew Hale, and William Blackstone among them – praised the open and confrontational style of the English criminal trial. In a celebrated 16th century description, for example, Smith spoke approvingly of an "altercation" between accuser and accused. Nearly two centuries later, Sollom Emlyn proclaimed: "In other Countries, the Witnesses are examin'd in private, and in the Prisoner's Absence; with us, they are produced face to face, and deliver their Evidence in open Court, the Prisoner himself being present, and at liberty to cross-examine them." And later in the 18th century Blackstone spoke of "the confronting of adverse witnesses" as being among the advantages of "the English[] way of giving testimony, *ore tenus*" – that is, by word of mouth, or orally.

To be sure, the norm of confrontation was not always respected. First, a set of courts in English followed continental procedures rather than those of the common law. Precisely for that reason, they were politically controversial, and most of them (notably the Court of Star Chamber), being viewed as arms of an unlimited royal power, did not survive the upheavals of the 17th century. The equity courts did survive, but without criminal jurisdiction, and well before the end of that century the common law courts had a sophisticated body of doctrine

governing when depositions taken in equity, subject to cross-examination on written questions, could be used in lieu of testimony at trial because the witness was unavailable.

Second, justices of the peace were required by statute to examine felony witnesses, and these examinations were admissible at trial, even though the witness had not been cross-examined, if the examination was taken under oath and the witness was then unavailable. This treatment – which almost certainly was one of the chief abuses at which the Confrontation Clause was aimed – was a continuing source of controversy, and in 1696, in the celebrated case of *Rex v. Paine*,[6] the court refused to extend it to misdemeanor cases; eventually, the practice was abolished by statutes for felony cases as well.

Finally, and perhaps most significantly, in politically charged cases the Crown, trying to control its adversaries through the criminal law, sometimes used testimony taken out of the presence of the accused. Thus, the battle for confrontation was most clearly fought in the treason cases of Tudor and Stuart England. Even early in the 16th century, treason defendants demanded that witnesses be brought before them; often they used the term "face to face." Sometimes these demands were heeded, but what is most notable is that they found recurrent legislative support, acts of Parliament repeatedly requiring that accusing witnesses be brought "face to face" with the accused. By the middle of the 17th century, the battle was won, and courts routinely required that treason witnesses testify before the accused and be subjected to questioning by him.

The notorious case of Walter Raleigh was one of many in which Crown prosecutors used confessions made by alleged accomplices of the accused even though the confessions were not made under oath or before the accused; the self-accusing

[6] 87 Eng. Rep. 584, 90 Eng. Rep. 527, 90 Eng. Rep. 1062, 91 Eng. Rep. 246, 91 Eng. Rep. 1387 (K.B. 1696).

nature of such statements was said to be an adequate substitute for the usual requirements of testimony. But in 1662, the judges of the King's Bench ruled unanimously and definitively in *Tong's Case* that a pretrial confession "cannot be made use of as evidence against any others" than the confessor himself.[7]

The confrontation right naturally found its way to America. There, the right to counsel developed far more quickly than in England, and with it an adversarial spirit that made confrontation especially crucial. The right became a particular focus of American concerns in the 1760s when the Stamp Acts and other Parliamentary regulations of the colonies provided for the examination of witnesses upon interrogatories in certain circumstances. Not surprisingly, the early state constitutions guaranteed the confrontation right. Some used the time-honored "face to face" formula; others, following Hale and Blackstone, adopted language strikingly similar to that later used in the Sixth Amendment's Confrontation Clause.

This account has not mentioned reliability. Though one of the advantages perceived for confrontation was its contribution to truth-determination, the confrontation right was not considered contingent, inapplicable upon a judicial determination that the particular testimony was unreliable.

Similarly, the law against hearsay has not played a role in this account. Hearsay law, like evidence law more generally, was not well developed at the time the Clause was adopted, much less during the previous centuries. In expressing a fundamental procedural principle governing how testimony must be given, the Clause was not meant to constitutionalize the law of hearsay. The *Roberts* framework is a latter-day construct, with no historical roots.

Thus, recent developments under the European Convention on Human Rights are noteworthy. The Convention contains

[7] *Case of Thomas Tong*, 84 Eng. Rep. 1061, 1062 (K.B. 1662), *cited in Lilly*, 527 U.S. at 141 (Breyer, J., concurring).

nothing resembling a hearsay rule, of course, because most of the judicial systems falling under it do not have hearsay law. But Articles 6(1) and 6(3)(d) of the Convention contain, respectively, a general protection of a criminal defendant's right to a fair trial and a specific protection of his right "to examine or have examined witnesses against him." Under these provisions, the European Court of Human Rights has issued a series of decisions establishing a right of confrontation, which it has referred to as such.[8] Thus, the confrontation right, which gained its strongest recognition in the common law system but long predated it, is once again a fundamental part of Western jurisprudence.

III. THE TESTIMONIAL APPROACH REFLECTS VALUES WARRANTING CONSTITUTIONAL PROTECTION, AND THE *ROBERTS* FRAMEWORK DOES NOT.

Securing testimony by a declarant, face-to-face with an accused, nearly always has some benefits in comparison to mere presentation of a prior statement by that declarant. But only when the prior statement was itself testimonial in nature is there justification for a systematic constitutional rule rejecting use of the statement, even if the declarant is unavailable to be a witness, if the accused has not had an opportunity to confront her.

When the prosecution offers an ordinary hearsay statement, made without any anticipation of evidentiary use, it will often be better, taking into account considerations of truth determination and cost, to admit the statement rather than to

[8] *E.g., Saïdi v. France*, 17 E.H.R.R. 251, 270 (1993) ("Neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial").

exclude it. Considering just truth determination, live testimony of the declarant, perhaps supplemented by the hearsay statement, is presumably preferable to presentation of the hearsay statement alone. But sometimes the declarant cannot be feasibly produced as a witness, and so the choice is between admitting the statement and hearing nothing from the declarant. If the statement is significantly probative and not particularly prejudicial, which is true of much hearsay, it is better to admit it than to exclude it. And even if it would be possible to produce the declarant as a witness, the marginal benefits of insisting that this be done might not be worth the cost of doing so.

But whether such a non-testimonial hearsay statement should or should not be admitted is, of course, a matter of local evidentiary law. If a particular jurisdiction concludes that the probative value of such hearsay statements outweighs the prejudicial effect, either categorically or on a case-by-case basis, that jurisdiction should not be precluded by the Confrontation Clause from allowing such statements into evidence. Conversely, if the particular jurisdiction concludes that such statements should not be admitted, that choice is also entitled to respect. By decoupling the Confrontation Clause from the minutiae of the hearsay rules, the testimonial approach would allow each jurisdiction to make its own determination as to what non-testimonial hearsay should be admitted in criminal cases.

Now consider the situation in which the prior statement was testimonial – that is, made with reasonable anticipation of evidentiary use. In this context, the same factors continue to weigh, and with additional force, against admission of the prior statement if the accused has not had an opportunity to confront the declarant. But additional factors apply as well. The fundamental difference is this: When the statement is testimonial, the question is not simply an evidentiary one, whether the particular statement should be included in the body

of information presented to the trier of fact. Rather, there is now a basic procedural issue, of how testimony against an accused shall be given. And there is no doubt that the constitutional demand is that such testimony be given face to face with the accused, subject to cross-examination. *Cf. Lilly*, 527 U.S. at 142 (Breyer, J., concurring), *quoting Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) ("[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation"). Insisting on such confrontation as the required method for giving testimony serves several important instrumental purposes:

• Confrontation guarantees openness of procedure, which among other benefits ensures that the witness' testimony is not the product of torture or of milder forms of coercion or intimidation. This is particularly important given the contrast to early continental systems, in which coercion of witnesses examined privately was very common.

• Confrontation provides a chance for the defendant, personally or through counsel, to dispute and explore the weaknesses in the witness' testimony. In Thomas Smith's day that chance came in the form of a wide-open altercation. Today it comes in the form of cross-examination, usually through counsel. The Court has repeatedly endorsed Wigmore's characterization of cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[9]

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[9] 5 JOHN H. WIGMORE, EVIDENCE § 1367, p. 32 (James Chadbourn rev. 1974), *quoted in part in Lilly*, 527 U.S. at 123 (plurality opinion); *White*, 502 U.S. at 356; *Craig*, 497 U.S. at 844 ; *Perry v. Leeke*, 488 U.S. 272, 283 n.7 (1989); *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *Green*, 399 U.S. at 158; *Ford v. Wainwright*, 477 U.S. 499, 415 (1986); *Lee*, 476 U.S. at 540; *Watkins v. Sowders*, 449 U.S. 341, 348 n.4 (1981); *Roberts*, 448 U.S. at 63

Of course, as Wigmore recognized, cross-examination may sometimes lead the trier of fact away from the truth rather than towards it. But the constitutionally required "beyond a reasonable doubt" standard of persuasion in a criminal case reflects the extreme disutility of a false conviction. *See In re Winship*, 358 361-64 (1970). The same consideration demands that the accused be able to cross-examine adverse witnesses even if sometimes that requirement prevents the conviction of a guilty person.

• Confrontation discourages falsehood as well as assists in its detection. The prospect of testifying under oath, subject to cross-examination, and in the presence of the accused makes false accusation much more difficult than it would be otherwise. *Craig*, 497 U.S. at 846; *Coy v. Iowa*, 487 U.S. 1012, 1019- 20· (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.').[10]

• If, as is usually the case, the confrontation occurs at trial or in a videotaped proceeding, the trier of fact has an

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n.6; *cf. United States v. Salerno*, 505 U.S. 317, 328 (1992) (Stevens, J., dissenting) ("Even if one does not completely agree with Wigmore's assertion . . . one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate.").

[10] *See also* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1490 (1999) ("The witness whose credibility would be destroyed by cross-examination will not be called at all or will try to pull the sting of the cross-examiner by acknowledging on direct examination the facts that a cross-examiner could be expected to harp on."). Of course, the same prospect may deter the giving of truthful testimony. But, again, the tradeoff accords with the fundamental value underlying the "beyond a reasonable doubt" standard. *Craig*, 497 U.S. at 846-47; *Coy*, 487 U.S. at 1020.

opportunity to assess the demeanor of the witness. *Craig,* 497 U.S. at 844; *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (confrontation gives the accused the opportunity "of compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.").

● Confrontation eliminates the need for intermediaries, and along with it any doubt about what the witness's testimony is.

Beyond these instrumental purposes, confrontation serves a "strong symbolic purpose" – again, one that has substantial force only when the prior statement is testimonial – that has been repeatedly recognized by this Court. *Craig,* 497 U.S. at 846; *Lee,* 476 U.S. at 540. Even if confrontation had no impact on the quality of prosecution evidence, it would be important to protect because, as the Court said in *Coy* and repeated in *Craig*, "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" It is not only fairness to the accused that is at stake, but also the moral responsibility of witnesses and of society at large, for "requiring confrontation is a way of reminding ourselves that we are, or least want to see ourselves as, the kind of people who decline to countenance or abet what we see as the cowardly and ignoble practice of hidden accusation." Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003).

The symbolic value of confrontation is enhanced by the historical background that we have reviewed in Part II of this brief. Indeed, even if confrontation served no other value at all, it would be important to honor the right that accused persons have had for many centuries governing how witnesses against them may testify. Like Festus, we can say that it is not our way to allow an accused to be convicted of a crime without his having had a chance to have the witnesses against him testify to his face.

These symbolic and historic functions, as well as the instrumental values achieved by making confrontation the prescribed method for giving testimony, refute the notion that the confrontation right may be abrogated on a case-by-case basis. That is, it would be inappropriate to hold that confrontation is unnecessary in a given case because the quality of the particular witness's testimony is good enough even without confrontation. The Sixth Amendment does not provide that if the quality of the prosecution evidence in a given case is good enough then we may dispense with the right to jury or the right to counsel. The right to confront adverse witnesses should be treated the same way.

Indeed, this is clearly the rule with respect to in-court witnesses. Suppose a prosecution witness gives significant direct testimony at trial but that the accused, through no fault of his own, has no opportunity to cross-examine – perhaps the witness dies or simply refuses to answer the accused's questions. The direct testimony must be struck, without regard to its reliability.[11] There is no reason why the rule should be different with respect to a witness who makes a testimonial statement out of court but then fails, for reasons other than the accused's wrongdoing, to testify at trial. Such testimony should not be allowed to help convict the accused.

The testimonial approach, then, reflects a basic principle that is central to our system of criminal justice. The *Roberts* framework, by contrast, does not implement values warranting constitutional protection. That approach purports to make reliability, or trustworthiness, the crucial consideration. But the

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[11] *See, e.g., Toogood v. Borg*, 828 F.2d 571, 572-73 (9th Cir. 1987) (explaining that when a prosecution witness cannot or will not submit to cross-examination, the direct testimony is struck, but that if this is inadequate a mistrial is required).

enterprise is misguided. *See, e.g.*, Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in White v. Illinois Requires a New Look at Confrontation*, 22 CAP. U. L. REV. 145, 148 (1993) ("The Court's accuracy rationale is the product of smoke and mirrors, rather than of a realistic analysis of the values underlying confrontation.").

A trial is not, and as a practical matter cannot be, limited to trustworthy evidence. Indeed, were there truly trustworthy evidence with respect to a given factual issue, the issue would not have to be tried at all, or at least the outcome would be virtually a foregone conclusion. In a trial all sorts of evidence that taken alone might be very *un*trustworthy is presented to the trier of fact. This includes the live testimony of witnesses testifying from personal knowledge and subject to cross-examination – the paradigm of acceptable evidence and yet a species that is often highly unreliable. *See, e.g., United States v. Wade*, 388 U.S. 218 (1967); ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (3d ed. 1997). The trier of fact must assess all the evidence, and even though the individual items may be unreliable the evidence may be enough in the aggregate to support a finding of proof beyond a reasonable doubt.

Nevertheless, the perception has arisen that only if hearsay is sufficiently reliable is it safe to dispense with the usual requirement of cross-examination. *See Lilly,* 527 U.S. at 123 (plurality opinion, speaking of statements containing guarantees of trustworthiness "such that adversarial testing would be expected to add little, if anything, to the statements' reliability"). The perception is unfounded empirically. There is no good support for the conclusion that jurors tend systematically to over-value hearsay, and in some settings they seem to *under*-value it. Roger C. Park, *Visions of Applying the Scientific Method to the Hearsay Rule*, MICH. ST. DCL L. REV. (2003, forthcoming). To the extent that the "mission" of the

Confrontation Clause is to "advance the accuracy of the truth-determining process in criminal trials," *Tennessee v. Street,* 471 U.S. 409, 415 (1985) (citation and internal quotation marks omitted), the attempt to exclude hearsay not deemed sufficiently reliable is self-defeating.

Moreover, the doctrine that proceeds from this attempt is unworkable. Suppose that the doctrine were taken literally, and hearsay were allowed only "if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." *Idaho v. Wright*, 497 U.S. 805, 820 (1990). If this standard were applied conscientiously, very few statements would meet it – and there is no ground for confidence that hearsay law would identify them. For example, it is self-evident that statements by conspirators in furtherance of their criminal enterprise, admissible in federal court pursuant to Fed. R. Evid. 801(d)(2)(E), are not a particularly trustworthy class of assertions. *See* 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE 295 (2d ed. 1994) ("the case for reliability is at best marginal"). Similarly, consider which of the following is more likely to reflect a reasonable assessment by defense counsel when a dying declaration is admitted, pursuant to rules like Fed. R. Evid. 804(b)(2): (1) "If only I could cross-examine the declarant, I could explore whether she really had an opportunity to observe her assailant, whether her mind was clear at the time she accused my client, and whether she had a grudge against him," or (2) "It doesn't matter that I couldn't cross-examine. She knew she was about to die when she spoke, and no one would want to meet with her Maker with a lie on her lips, *see Wright,* at 820, so I couldn't have done a thing with her." We do not contend that such statements should always be excluded – but only that they should not be admitted on the clearly false ground that they are reliable.

Finally, it is singularly inappropriate for the adjudicative system to say to an accused, in effect, "Yes, it is true that you

did not get a chance to question this witness. But we have concluded that this does not matter, because the statement was so reliable that cross-examination would have made very little difference." Such a ruling ignores not only the human values underlying the Confrontation Clause but also the defend[illegible]'s right to present his case to, and to attempt to persuade, the [illegible]er of fact.

In sum, the Confrontation Clause is meant not to ensure that only reliable evidence is presented at trial but to guarantee the traditional principles by which testimony is given. This proposition points the way to the manner in which the Clause can be implemented faithfully and practically.

IV. AS COMPARED TO THE *ROBERTS* FRAMEWORK, THE TESTIMONIAL APPROACH GIVES BETTER GUIDANCE TO THE LOWER COURTS, IS MORE PRACTICAL TO IMPLEMENT, AND IS LESS SUSCEPTIBLE TO MANIPULATION.

The testimonial approach can be articulated in terms of four basic questions.

First, was the statement testimonial in nature? The statement falls within the scope of the Confrontation Clause if and only if the answer is affirmative. This question can be made operational in various ways. One practical possibility is an objective test that would ask: Would a reasonable person in the declarant's position anticipate that the statement would likely be used for evidentiary purposes? Adoption of the testimonial approach in this case does not require marking out the precise bounds of the class of testimonial statements because here, as in most cases, the exact wording of the test would not be decisive. It is clear that Sylvia Crawford's statement to the police was testimonial, under any reasonable approach. The statement was electronically recorded by the police in a police station after the incident at issue. The

recording was made with considerable ceremony, clearly for use in later proceedings, and Ms. Crawford spoke in response to questioning much as if in a deposition – but without oath or cross-examination. If statements made in such circumstances are allowed as proof at trial, then under any plausible view the declarant is testifying when she makes such a statement, for there is no doubt that a reasonable person in her position would anticipate that her statements would likely be used as evidence in a future criminal proceeding.

Just as in this case, the question of whether a given statement should be considered testimonial can usually be rather easily resolved, as indicated by the following "rules of thumb," *see* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1040–43 (1998). A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made directly to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.

Thus, testimonial statements include not only statements made as testimony at the trial itself, *see Coy*; *Craig*, but also testimony given at a prior trial, *see Mattox*; *Mancusi v. Stubbs*, 408 U.S. 204 (1972); or other judicial proceeding, *see Pointer v. Texas*, 380 U.S. 400 (1965); *Barber v. Page*, 390 U.S. 719 (1968); *Green*; *Roberts*, and statements, like the one in this case, knowingly made to investigating authorities, *see Douglas v. Alabama*, 380 U.S. 415 (1965); *Green*; *Lee*; *Lilly*; *United*

States v. Owens, 484 U.S. 554 (1988). At the other end, some statements, including those made in furtherance of a conspiracy, *see United States v. Inadi*, 475 U.S. 387 (1986); *Bourjaily v. United States*, 483 U.S. 171 (1987), can be rather easily deemed non-testimonial, because they were made absent any indication of evidentiary use, *see Dutton v. Evans*, 400 U.S. 74 (1970), and these do not raise a concern under the Confrontation Clause (though other bodies of law, including the jurisdiction's hearsay law, may require exclusion). Inevitably, some cases remain near the borderline,[12] but that fact itself is not troublesome.

Assuming the statement was testimonial, so that the declarant should be deemed to have been acting as a witness in making it, then the accused had a right to confront the witness. The second basic question, then, is: *Will the accused have had an adequate opportunity to confront the witness?* In some settings, this question poses interesting issues, such as whether the witness may testify via an electronic connection to the

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[12] *See, e.g., Wright*; *White*; Friedman & McCormack, *supra*, 150 U. PA. L. REV. at 1241-43. *Amici* candidly acknowledge that statements by young children will present some of the closest issues under the testimonial approach, just as they do in the current framework. Pre-trial statements by children to care-givers such as parents and physicians may be considered non-testimonial in some circumstances even though statements by adults in similar circumstances would likely be considered testimonial. Depending on the context, the statement of a very young child of limited understanding might be considered for purposes of the Confrontation Clause to be more like the barking of a dog, and so non-testimonial, than like the accusatory statement of an adult. A statement by a child in response to questioning by a police officer or physician to whom the child has been referred because of suspicions of abuse is more likely to be testimonial than is a spontaneous statement by the child before abuse has been suspected. *See generally* Richard D Friedman, *The Conundrum of Children, Hearsay, and Confrontation*, 65 LAW & CONTEMP. PROBS. 243, 249-52 (Winter 2002).

courtroom, *see Craig*,[13] whether an opportunity to cross-examine at as preliminary hearing suffices for purposes of the Confrontation Clause, *Green*, or whether the witness's memory loss at the time of cross-examination unduly impairs the accused's confrontation opportunity. *Owens*. Usually, though, the answer to this question is clear, as it was, for example, in *Pointer*, *Douglas*, *Lee*, and *Lilly*, and as it is here; Michael Crawford did not have an opportunity to cross-examine Sylvia.

If the accused will not have had an adequate opportunity to confront the witness, then introduction of the testimonial statement to prove the truth of what it asserts[14] violates the accused's confrontation right unless the answer to the third question is in the affirmative: *Did the accused waive the right to confrontation by failing to object, or forfeit it by misconduct?*[15] The accused might forfeit the right, for example,

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[13] *See also* Statements of Scalia, J., 535 U.S. 1159, and of Breyer, J., dissenting, 535 U.S. 1162, in conjunction with the decision not to transmit to Congress a proposed amendment to Fed. R. Crim. P. 26 (2002).

[14] *Cf. Tennessee v. Street*, 471 U.S. 409 (1985) (no confrontation violation where statement was not introduced to prove the truth of what it asserted).

[15] In the Washington appellate and supreme courts, but not in opposing *certiorari*, the State contended that petitioner, who strenuously asserted his confrontation right, nevertheless forfeited it by invoking marital privilege to keep Sylvia from testifying at trial. Even assuming that absent an assertion of privilege by petitioner Sylvia would have testified at trial – which does not appear to be true – petitioner clearly did not commit misconduct by asserting a right the State granted to him as a matter of law, and so the state courts correctly rejected the forfeiture argument. *Cf.* Fed. R. Evid. 804(b)(6) (providing for forfeiture of hearsay objection by "wrongdoing"); *Green v. United States*, 355 U.S. 184 (1957)

by intimidating the witness, kidnapping her, or murdering her. An accused cannot complain about his inability to confront the witness if it is his own wrongful conduct that created that inability. This principle – rather than the fiction that cross-examination would be practically useless anyway because a declarant would not to die with a lie on her lips – best explains the admissibility of certain statements by dying witnesses.[16]

If the testimonial statement was made at an earlier time, and the accused then had an adequate opportunity to confront the w: ness, a fourth question arises: *Has the witness been shown to be unavailable to testify at trial?* If the answer is negative, then the statement may not be used, because live testimony is possible and preferred. *See Barber*; *Roberts*, 448

(rejecting claim that defendant forfeited double jeopardy right against retrial on acquitted offense by successfully asserting statutory right to appeal conviction on lesser offense).

[16] If the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the confrontation right, even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable. Just as in *Bourjaily*, bootstrapping does not pose a genuine problem. *See* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997).

Note that if one took the rationale of the dying declaration exception seriously, it would justify admitting any statement made on the verge of death. The facts that the exception is limited to statements concerning the cause of the apparently impending death, and that within the criminal context it is limited to homicide cases, suggest that the motivating concern is that the victim cannot testify against the assailant at trial because the assailant killed her.

Children who might otherwise testify at trial are particularly susceptible to intimidation by criminal defendants, in which case forfeiture might apply. *See generally* Friedman, *Conundrum*, *supra*, 65 LAW & CONTEMP. PROBS. (Winter 2002) at 252-55.

U.S. at 63 ("the Confrontation Clause reflects a preference for face-to-face confrontation at trial"). If the answer is affirmative, however, the Confrontation Clause poses no obstacle to admissibility of the statement, unless the prosecution's wrongdoing caused the unavailability. *See Mattox*; *Mancusi*; *Roberts*. Taking the testimony at trial would be ideal, but the ideal is not possible; an opportunity for confrontation is what is essential, and the accused has had it.

We do not contend that resolution of all Confrontation Clause cases becomes easy under the testimonial approach. We do contend that this approach makes easy analysis of cases that, like *Pointer*, *Douglas*, *Lee*, *Lilly*, and this case, pose the core concerns underlying the Confrontation Clause. *See Lilly*, 527 U.S. at 143 (Scalia, J.) (describing the case as involving "a paradigmatic Confrontation Clause violation"). Some cases are close to the borderline, but that is as it should be. We also contend that this approach poses the questions that trial courts should be asking in addressing cases under the Clause, questions that will lead to appropriate results. Indeed, as the citations have suggested, we believe that this approach is consistent with the results of all the Court's Confrontation Clause precedents.

That the Court has reached sensible results under the *Roberts* framework does not suggest that the framework is accomplishing its purpose. On the contrary, the Court has reached sensible results only by manipulating the framework. The framework itself has not led to the results, but has only obscured the unarticulated principle that supports them.

For example, the Court has held that conspirator statements fall within a "firmly rooted" hearsay exception and thus satisfy the *Roberts* reliability requirement. *Bourjaily*, 483 U.S. at 182-84. But the Court did not even suggest that conspirator declarations are a particularly reliable set of statements. Quite the reverse is true. *See id.* at 201 (Blackmun, J., dissenting) ("this exemption has never been justified primarily upon

reliability or trustworthiness grounds and its reliability safeguards are not extensive"); *Inadi*, 475 U.S. at 405 ("It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis of law." (quoting Joseph H. Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV.1159, 1166 (1954))). It would be much better to recognize that conspirator statements are simply not testimonial and so do not fall within the scope of the Confrontation Clause at all.

On the other side, consider *Lee*. At issue was a confession by an accomplice who, while inculpating the accused, also accepted responsibility for a central role in a cold-blooded and brutal murder. Justice Blackmun argued powerfully that the confession was "thoroughly and unambiguously adverse to his penal interest," and that because the portion inculpating the accused was inseverable from the portion inculpating the declarant the statement could not be dismissed as merely an attempt to shift blame to the accused. 476 U.S. at 551-53. Nevertheless, a bare majority refused to treat the statement as a declaration against interest, saying in a footnote, "That concept defines too large a class for meaningful Confrontation Clause analysis." 476 U.S. at 544 n.5. This is an ironic response, given that the *Roberts* framework aims to simplify analysis by exempting from the Confrontation Clause categories of statements that fall within "firmly rooted" hearsay exceptions and so are deemed "without more" to be reliable. The majority then reached the highly contestable conclusion that the statement was not reliable, and so held that admission of the statement violated Lee's confrontation right. This awkward holding would have been unnecessary had the Court simply recognized that the accomplice's statement to the police was clearly testimonial; accordingly, it could not be introduced against Lee unless she had an opportunity to confront the accomplice.

Finally, consider the Court's treatment of unavailability. In *Roberts*, the Court appeared to state a broad rule that hearsay

would not be admissible unless the declarant was shown to be unavailable to be a witness. But in *Inadi* and again in *White* the Court restricted this principle, declining to apply it to the statements involved there and implying that it applied only to former testimony.[17] That the Court "effectively abandoned" the unavailability requirement except for former testimony, Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. Rev. 557, 561 (1988), was perplexing to knowledgeable observers. Calling this "an ironic result," for example, one leading textbook says:

> The major deficiency of hearsay is thought to be the absence of cross-examination, and one of the central concerns of the Confrontation Clause is to ensure that the cross-examination of testifying witnesses is not unduly hampered. Now it appears that the one traditional hearsay exception that turns on the opportunity for cross-examination may face a hurdle under the Confrontation Clause that no other hearsay exception need jump.

RICHARD O. LEMPERT, SAMUEL R. GROSS & JAMES S. LIEBMAN, A MODERN APPROACH TO EVIDENCE 756-57 (3d ed. 2000). *See also, e.g.*, Swift, *supra*, 22 CAP. U. L. REV. at 146-47 (criticizing *White*'s "blanket rejection of an unavailability requirement in most cases" and summarizing negative academic response).

The testimonial approach explains the conundrum. Former testimony should not be used in lieu of trial testimony if it is reasonably possible to cause the witness to testify at trial. But if the testimony of the witness cannot be secured at trial, then the former testimony is a satisfactory substitute, assuming the

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[17] In other settings, the Court has avoided the issue of unavailability. *Lilly*, 527 U.S. at 124 n.1 (plurality opinion); *Wright*, 497 U.S. at 816; *Lee*, 476 U.S. at 539.

accused had an adequate opportunity at an earlier time to confront the witness. If the accused did not have such an opportunity – as in this case, in *Lee*, and in *Lilly* – then the prior testimonial statement may not be used in place of trial testimony, whether the witness is available or not, so long as the accused did not waive or forfeit the confrontation right. If, on the other hand, the statement is not testimonial in nature, then the Confrontation Clause poses no obstacle to its admissibility (though local evidentiary rules might), whether the declarant is available or not. To a considerable extent, the hearsay exceptions other than the one for former testimony define, or can be manipulated to define, categories of evidence that are not testimonial. Statements falling within such categories should present no confrontation issue, irrespective of unavailability.

In short, the Court's results have been better than its reasons. It is therefore not surprising that lower courts have found the doctrine enunciated by the Court difficult to follow and have often reached unacceptable results, sometimes tolerating what clearly amounted to station-house testimony. For example, even though every member of the Court in *Lilly* agreed that the admission of a non-testifying accomplice's police confession against the defendant violated the Confrontation Clause notwithstanding the State's claim that the confession fell within the statement against penal interest hearsay exception, many lower courts since *Lilly* have admitted police confessions from non-testifying accomplices under that very same exception, often finding such statements to be exceptionally "trustworthy." *See* Roger W. Kirst, *Appellate Court Answers to the Confrontation Question in* Lilly v. Virginia, 53 SYR. L. REV. 87 (2003) (reviewing post-*Lilly* cases). Only if the Court articulates the underlying principle that has guided its decisions will the lower courts be able to follow its lead consistently.

The Court should resist the temptation to put off until

another day the restructuring that it needs to do. There will never be a case in which achieving a sensible result will *require* the Court to reject the current framework. But, as we have shown, that fact does not suggest that the framework is succeeding. On the contrary, it means that the framework is so malleable as to have no guiding force. A court can reach any result it sees fit under the current framework. If it is inclined to hold that the Confrontation Clause does not preclude admissibility of a given statement, it can find adequate case-specific "indicia of trustworthiness" to cite. If it is inclined to hold that the Clause does preclude admissibility, it can cite reasons why the particular statement is not in fact sufficiently trustworthy, and as in *Lilly* it can hold that the "firmly rooted" prong does not apply because the hearsay exception in issue is not "firmly rooted" to the extent the exception is deemed to cover statements of a given description. Alternatively, except when a federal court reviews a state conviction, the court can issue a restrictive ruling on hearsay law, and thus exclude the evidence without reaching the confrontation issue, though doing so has collateral consequences in making hearsay law unduly rigid in contexts where the confrontation right is not at stake.[18]

If the Court continues to use the present framework, it can continue to reach sensible results, but the lower courts will also continue to manipulate the doctrine to reach unpredictable and indefensible results. The Court should not forsake the opportunity to articulate and protect a noble principle of long standing, one that will provide clear guidance to the lower courts.

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[18] Thus, for example, *Williamson v. United States*, 512 U.S. 594 (1994), construed the exception for declarations against interest far more restrictively than most prior authorities suggested, *see* 2 MCCORMICK ON EVIDENCE 344-45 (John William Strong, gen. ed. 4th ed. 1992). The *Williamson* rule has limited applicability of the exception in civil as well as criminal cases. *See Silverstein v. Chase*, 260 F.3d 142 (2d Cir. 2001).

CONCLUSION

Current doctrine relies on hearsay law to do the work that should be performed by the Confrontation Clause, and this has been detrimental to both. It has made hearsay law overly rigid, and it has obscured the meaning of the Clause. Once it is recognized that the scope of the Clause is narrower than that of hearsay law, that it applies only to those statements that are testimonial in nature, the essence of that right becomes apparent: It protects one of the central procedural aspects of our system of criminal justice, the presentation of testimony in the presence of the accused and subject to cross-examination. That right may be waived or forfeited, but it is not subject to exceptions nor can it be trumped by a judicial determination that the particular statement at issue is reliable.

Respectfully submitted,

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